



Transactional Records Access Clearinghouse
Syracuse University

October 4, 2010

Catrina M. Pavlik-Keenan, FOIA Officer
U.S. Immigration and Customs Enforcement
800 North Capitol Street, NW
5th Floor, Suite 585
Washington, D.C. 20536

RE: ICE's September 30, 2010 emails and September 22 letter response¹ to our FOIA request for anonymous alien-by-alien data concerning arrests, detention, charging and removal statistics (ICE FOIA Case Number 2010FOIA4313)

Dear FOIA Director Pavlik-Keenan:

We are writing to draw your attention to a large number of serious legal and procedural deficiencies in your recent response to our request to Immigration and Customs Enforcement (ICE) under the Freedom of Information Act (FOIA) for agency performance statistics. These deficiencies involve violations of long-standing provisions of the FOIA, the FOIA regulations of your agency, and the stated policies and regulations of President Obama and Attorney General Holder.

The effect of your September 22 letter is to deny the American people information about an important and currently controversial aspect of a key obligation of the federal government: *what is it doing and not doing to enforce the nation's immigration laws.*

Dr. Long called you last Thursday on the above referenced matter, but regrettably you declined to speak to her directly and referred her to Mr. Bradley E. White, a FOIA attorney in your office. However, Mr. White told Dr. Long that he had no authority to act in the matter. We are therefore submitting our comments to you via this letter.

As your letter notes, TRAC's request is for anonymous alien-by-alien statistical data on arrest, detention, charging and removal activities. This detailed information is needed so that the public can determine what ICE *is* and *is not* currently doing to enforce the country's immigration laws. This same type of information covering earlier time periods

¹ On September 30 we received a letter from you dated September 22. While this letter referred to a listing ("spreadsheet") identifying the data items ICE was classifying as "unavailable" as an enclosure, the listing was not furnished with the letter but was later emailed us on September 30 by Mr. Bradley White after Dr. Long called him. Similarly, the notification that ICE has placed us in the 'all other' requestor category" while also referred to in your letter was not in fact received by us until September 30 when Mr. White sent us a second email forwarding it to us. In addition your letter makes reference to a "determination to deny our fee waiver request." However, your letter does not in fact purport to inform us about any such a determination. Further, we never previously received any communication notifying us that the agency was denying our fee waiver request.

was previously released by the agency, but for some unstated reason the agency has now decided to start withholding much of this data from the public.

To summarize, your letter seeks to bar public access to the information we requested by using two different approaches – both tactics that the FOIA specifically outlawed more than 40 years ago:

First, for more than half of the existing statistics we requested, your letter informs us the agency has deemed them “unavailable.” FOIA laws expressly require that a specific legal basis (“FOIA exemption”) must always accompany any decision to withhold public records. Your letter does not give any justification for withholding these data. FOIA laws prohibit withholding data simply because the information might prove embarrassing or subject the agency to public criticism.

Second, with respect to the remaining requested records, you imposed a \$450,000.00 processing fee; and informed us that at least \$225,000.00 must be paid in advance before you will begin processing our request. Yet Mr. White told us your office has absolutely no documentation and can provide no information explaining how this figure was derived. Again FOIA expressly prohibits an agency from manufacturing costs to discourage public access.

ICE Has No Authority to Label Its Records as “Unavailable” Since They Are Subject to Public Disclosure Requirements

As your letter notes, a conference on our request took place August 6. It was arranged by Patrick D. Contreras, who was introduced as “ICE’s data person.” A number of additional officials from ICE attended. You attended in person, while Dr. Long joined in by telephone. During the conference, a few ICE personnel indicated that there were numerous items of information in their database – many of which the agency had previously furnished in response to FOIA requests -- which they no longer wished to make available. During the meeting Dr. Long pressed these individuals for an explanation, but no reason for withholding the data was provided. This brought up a discussion of the law’s disclosure requirements that make it illegal to simply withhold data in the absence of a statutory exemption. At the end of the conference Dr. Long was told that ICE would get back to Dr. Long “shortly” on the release.

You then asked Dr. Long to stay on the phone line so that you could speak to her after the others had left. The contemporaneous notes Dr. Long made of your conversation indicate that you assured Dr. Long that you continually had to tell ICE personnel they cannot simply say “no” in response to a FOIA request, they *must* give a reason. You also indicated that the “front office” also always tells them that if they have released information before they simply cannot withhold something now. The impression that Dr. Long was left with was that the resistance that had surfaced during the meeting to providing the requested data would in the end be surmounted and that we would be obtaining the data shortly.

We were therefore greatly surprised when on September 30 we received your letter asserting that for more than half of the data items we requested: "ICE cannot provide [the] statistical information." You gave no justification of any kind for withholding this information. Among the information your letter lists as being inexplicably "unavailable" were:

Where events took place:

- The location of the alien's apprehension or arrest (city or state)
- The location (city, state, or port) from which the alien was removed or departed this county
- The detention facility where alien was last detained, or if still detained, the current detention facility

Criminal background of the alien:

- Nature of each previous criminal charge and its disposition (convicted, not convicted, pending, etc.)
- Whether the alien is an "aggravated felon"
- The nature of the formal removal charges

Alien's family status:

- Marital status
- Children/ kinship

These categories were all previously made publicly available while now – in the lead-up to the November elections -- are suddenly deemed "unavailable." These data are, of course, among the very pieces of information the public requires to determine what in fact ICE *is* versus *is not* doing to enforce the country's immigration laws in individual communities across this nation.

\$450,000.00 Processing Fee

Of the remaining information items that you say could be made available, your letter informed us that the agency will not begin processing our request until we agree in writing to pay an estimated fee of \$450,000.00, and immediately transmit an advance payment of at least \$225,000.00.

No documentary basis to substantiate fee. Last Thursday when we spoke to Mr. White and asked him for a further breakdown of these charges, he informed us that your office never received anything in writing from ICE staff relating to the \$450,000.00 estimate. Mr. White told us that there only had been a single phone call in which the fee was discussed. When we asked about records made of that phone conversation, however, he asserted that no record of any kind had been made of the phone call, and he further could not remember any specific details from that call. Accordingly, he said your office had no information concerning what types of charges were included in the \$450,000 figure or any specifics on how these individual items had been calculated.

Because the laws passed by Congress, as well as DHS implementing regulations, provide numerous rules regarding what items can be charged for under what circumstances as well as how each item must be calculated, the failure of your

office to have any documentary basis to substantiate the amount casts grave doubt on the figure's legitimacy.²

Failure to provide reason for determining Syracuse University is not an educational institution.³ Among the steps the agency must follow is to place the requestor into a specific "requestor category." TRAC, as a research center at Syracuse University, falls into the "educational institution" category³ and as a result all search fees must be waived. Mr. White, however, confirmed that we had *not* been placed in the "educational institution" category but in the "all other" requestor category for which search fees are charged. When Dr. Long asked Mr. White for the reason ICE had placed us in the "all other" category, he declined to provide any reason and simply stated that it was ICE's "standard policy not to provide any basis for classification determinations."

No written determination that provision of the requested information was not in the public interest. DHS regulations require your office to waive fees in a request like ours when disclosure of the information "is in the public interest because it is likely to contribute significantly to public understanding of the ... activities of the government." Since these data are essential in determining what ICE is doing to enforce immigration laws our original request asked you to waive processing fees. We believe disclosure is in the public interest since TRAC will publish these statistics, making them publicly accessible on our web site as we have regularly done with previous data we have received. We have yet to receive any written determination on our fee waiver request. Again, your letter ignores this fact and simply refers to a determination as if it had previously taken place.⁴ When Dr. Long asked Mr. White during her phone conversation last Thursday for the reason ICE had determined not to waive any fees, he again declined to provide any reason and reiterated that it was ICE's "standard policy not to provide any basis for its decisions."

Required consultation not provided. Your letter also failed to comply with DHS regulations at 6 CFR 5.11(e) which require that whenever a notice is given to a requestor that the anticipated process fee is more than \$25, the agency *will offer* the requester an opportunity to discuss the matter with Department personnel to see if there is a way to meet the requester's needs at a lower cost. Your letter neglected to include

² In addition, your letter makes no reference to Section 6(b) of the 2007 OPEN Government Act which limits search and copying fees that can be charged where -- as in this case -- the agency has failed to comply with FOIA time limits for processing the request. We direct your attention to these provisions and ask for affirmative evidence that these limits were properly taken into account in deriving the fee you are imposing.

³ DHS implementing regulations of FOIA at 6 CFR 5.11(b)(4) defines an educational institution as follows: "Educational institution means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program of scholarly research."

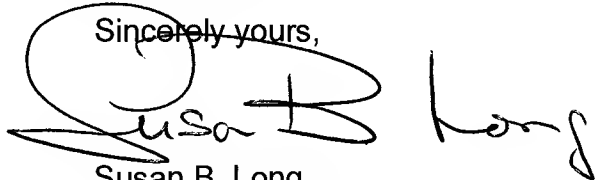
⁴ In a related request (2010FOIA3333) which had asked for documentation including the list of information items included in certain modules in your database, the FOIA analyst from your office informed us on June 4 that a full waiver of fees was being granted. Thus, it is particularly surprising that release of the actual data in this same database would be found somehow not to be in the public interest.

this required offer of consultation. In addition, when we called your office you declined to speak with Dr. Long and Mr. White declared that your office had no information on how the cost figure was derived.

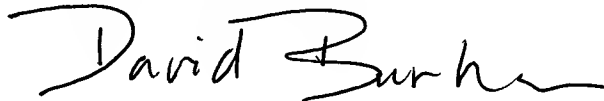
In short, your letter in withholding these requested data does not conform to either legal or procedural requirements in the law or in the agency's own regulations. We ask you to correct these deficiencies and promptly release all requested data.

In closing we wish to reiterate that, as Dr. Long mentioned during the August 6 conference, TRAC would be delighted to work cooperatively with the agency to find a way to produce the data extract we have requested with minimum effort and cost on everyone's part. TRAC has over two decades of experience working with other federal agencies in obtaining individual data extracts that also typically involve millions of records. Using efficient methods, it has been our experience that such data extracts usually can be produced in a straightforward manner. We are confident an approach can be found if we work together that will achieve this same objective here.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Susan B. Long". The signature is fluid and cursive, with the first name "Susan" being more prominent.

Susan B. Long
Co-director TRAC and
Associate Professor
Martin J. Whitman School of Management
Syracuse University

A handwritten signature in black ink, appearing to read "David Burnham". The signature is fluid and cursive, with the first name "David" being more prominent.

David Burnham
Co-director TRAC and
Associate Research Professor
S.I. Newhouse School of Public Communication
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Copies To: John T. Morton
Assistant Secretary of Homeland Security
for Immigration and Customs Enforcement

Attorney General Eric Holder